

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KEVIN A. GEARHART,

Petitioner,

v.

ROSEMARY NDOH, Warden,

Respondent.

Case No. [18-cv-06017-DMR](#) (PR)

**ORDER TO SHOW CAUSE; AND  
DENYING PETITIONER'S  
MOTION FOR APPOINTMENT  
OF COUNSEL**

Petitioner, a state prisoner, has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the full filing fee. He has also filed a motion for appointment of counsel. Dkt. 2.

Pursuant to 28 U.S.C. § 636(c), with written consent of all parties, a magistrate judge may conduct all proceedings in a case, including entry of judgment. Appeal will be directly to the United States Court of Appeals for the Ninth Circuit. *See* 28 U.S.C. § 636(c)(3).

On October 15, 2018, Petitioner consented to magistrate judge jurisdiction in this matter. Dkt. 4.

It does not appear from the face of the petition that it is without merit. Good cause appearing, the court hereby issues the following orders:

1. The Clerk of the Court shall serve a Magistrate Judge jurisdiction consent form, a copy of this Order, as well as the petition and all attachments thereto upon Respondent and Respondent's attorney, the Attorney General of the State of California. The Clerk shall also serve a copy of this Order on Petitioner at Petitioner's current address.

2. Within **twenty-eight (28) days** of the issuance of this Order, Respondent shall complete and file the Magistrate Judge jurisdiction consent form to indicate whether Respondent consents or declines to proceed before the assigned Magistrate Judge. Respondent is free to

1 withhold consent without adverse consequences. If Respondent consents to a Magistrate Judge's  
2 jurisdiction, this case will be handled by the undersigned Magistrate Judge. If Respondent  
3 declines, the case will be reassigned to a District Judge. Whether Respondent consents or declines  
4 to proceed before the assigned Magistrate Judge, the parties shall abide by the briefing schedule  
5 below.

6 3. Respondent shall file with this court and serve upon Petitioner, within **sixty (60)**  
7 **days** of the issuance of this Order, an Answer conforming in all respects to Rule 5 of the Rules  
8 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be issued.  
9 Respondent shall file with the Answer a copy of all portions of the relevant state records that have  
10 been transcribed previously and that are relevant to a determination of the issues presented by the  
11 petition.

12 4. If Petitioner wishes to respond to the Answer, Petitioner shall do so by filing a  
13 Traverse with the court and serving it on Respondent within **twenty-eight (28) days** of  
14 Petitioner's receipt of the Answer. Should Petitioner fail to do so, the petition will be deemed  
15 submitted and ready for decision **twenty-eight (28) days** after the date Petitioner is served with  
16 Respondent's Answer.

17 5. Respondent may file with this court and serve upon Petitioner, within **sixty (60)**  
18 **days** of the issuance of this Order, a motion to dismiss on procedural grounds in lieu of an  
19 Answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing Section  
20 2254 Cases. If Respondent files a motion to dismiss, Petitioner shall file with the court and serve  
21 on Respondent an opposition or statement of non-opposition to the motion within **twenty-eight**  
22 **(28) days** of receipt of the motion, and Respondent shall file with the court and serve on Petitioner  
23 a reply within **fourteen (14) days** of receipt of any opposition.

24 6. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the  
25 court and Respondent informed of any change of address and must comply with the court's orders  
26 in a timely fashion. Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se*  
27 whose address changes while an action is pending must promptly file a notice of change of  
28 address specifying the new address. *See* L.R. 3-11(a). The court may dismiss a *pro se* action

1 without prejudice when: (1) mail directed to the *pro se* party by the court has been returned to the  
2 court as not deliverable, and (2) the court fails to receive within sixty days of this return a written  
3 communication from the *pro se* party indicating a current address. *See* L.R. 3-11(b); *see also*  
4 *Martinez v. Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).  
5 Petitioner must also serve on Respondent's counsel all communications with the court by mailing  
6 a true copy of the document to Respondent's counsel.

7 7. Upon a showing of good cause, requests for a reasonable extension of time will be  
8 granted provided they are filed on or before the deadline they seek to extend.

9 8. Petitioner's motion for appointment of counsel (dkt. 2) is DENIED without  
10 prejudice. *See Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986) (unless an evidentiary  
11 hearing is required, the decision to appoint counsel in habeas corpus proceedings is within the  
12 discretion of the district court). Petitioner clearly presented his claims for relief in the petition and  
13 an order to show cause is issuing. *Accord Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir. 1984)  
14 (although petitioner had no background in law, denial of appointment of counsel within discretion  
15 of district court where petitioner clearly presented issues in petition and accompanying  
16 memorandum). The court will appoint counsel on its own motion if an evidentiary hearing is later  
17 required. *See Knaubert*, 791 F.2d at 728 (appointment of counsel mandatory if evidentiary  
18 hearing is required).

19 9. This Order terminates Docket no. 2.

20 IT IS SO ORDERED.

21 Dated: November 16, 2018

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23 

24 DONNA M. RYU  
25 United States Magistrate Judge  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

KEVIN A. GEARHART,  
Plaintiff,

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ROSEMARY NDOH,  
Defendant.

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**CERTIFICATE OF SERVICE**


I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 16, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Kevin A. Gearhart ID: AT 5071  
Avenal State Prison  
P.O. Box 159  
Avenal, CA 93204

Dated: November 16, 2018

Susan Y. Soong  
Clerk, United States District Court

By:   
Ivy Lerma Garcia, Deputy Clerk to the  
Honorable DONNA M. RYU